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No. 98-1097

IN THE
Supreme Court of the United States

U-HAUL CO. OF CLEVELAND,
Petitioner,

v.

LEE KUNKLE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to S. Ct. Rule 15.8, Petitioner U-Haul Co. of Cleveland ("U-Haul")* submits this Supplemental Brief in light of this Court's decision in *Cleveland* v. *Policy Management Systems Corp.*, No. 97-1008. In its Petition filed January 8, 1999, U-Haul requested that the Court defer consideration of the Petition until it issued its decision in *Cleveland*. *Cleveland*, like this case, involved questions concerning the effect on ADA litigation of a plaintiff's earlier claims of total disability when seeking insurance benefits. U-Haul had argued below that Respondent Kunkle's statements concerning his disability when seeking benefits from the Social Security Administration precluded his ADA action as a matter of law or, if

* Petitioner's Rule 29.6 Statement appears at Pet. ii.

the action was not precluded, entitled U-Haul to judgment as a matter of law once those statements were given appropriate evidentiary weight. *See* Pet. 7 & n.2 (citing record).

On May 24, 1999, this Court issued its opinion in *Cleveland*. The Court rejected the first argument U-Haul had made in the courts below, holding that "pursuit, and receipt, of SSDI benefits does not automatically estop the recipient from pursuing an ADA claim * * * [n]or does the law erect a strong presumption against the recipient's success under the ADA." Slip op. at 1.

The Court also held, however, that "an ADA plaintiff cannot simply ignore her SSDI contention that she was too disabled to work," *id.* at 1-2, and that "[t]o survive a defendant's motion for summary judgment, she must explain why that SSDI contention is consistent with her ADA claim that she could 'perform the essential functions' of her previous job, at least with 'reasonable accommodation.'" *Id.* at 2. *See also id.* at 10 ("[A]n ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation.").

It is this clarification of the evidentiary burdens on an ADA plaintiff that requires a remand for further consideration by the courts below. It is clear from the record that those courts did *not* require respondent Kunkle to "proffer a sufficient explanation" for "the apparent contradiction" arising out of his statements to the SSA. *Id.* When U-Haul moved for summary judgment, for example, the district court—in addition to rejecting U-Haul's claim that Kunkle was estopped from bringing his ADA claim—held simply that "representations by a plaintiff that he is entitled to disability benefits * * * [are] *only a factor to consider*" in an ADA case. Pet. App. 17a (emphasis

added). Saying that the statements are "only a factor to consider" is of course a far cry from this Court's requirement that a plaintiff must provide a "sufficient explanation" for the apparent inconsistency.

There is no evidence that the courts below applied the evidentiary standard articulated in *Cleveland* when the case was submitted to the jury, or when the courts considered U-Haul's motion for judgment as a matter of law. On the contrary, when U-Haul argued after trial that Kunkle's statements entitled it to judgment as a matter of law the district court wrote that it "declines to revisit the issue and stands by its prior ruling" on the motion for summary judgment, Pet. App. 25a—which treated the statements as "*only a factor to consider.*" Pet. App. 17a (emphasis added).

It is therefore clear from the record that the courts below did not apply the law as articulated by this Court in *Cleveland* to the facts of this case. In these circumstances, it is this Court's practice to leave that exercise to the lower courts in the first instance. *See Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam) (GVR order "assists this Court by procuring the benefit of the lower court's insight before we rule on the merits"). *See also id.* at 181 (GVR in light of postjudgment decision of this Court is "appropriate to preserve the operational premise of a multitiered judicial system (viz., that lower courts will have the first opportunity to apply the governing law to the facts)") (Scalia, J., dissenting). The Court should therefore grant the petition, vacate the decision below, and remand the case to the lower courts for further consideration in light of *Cleveland*.

CONCLUSION

For the foregoing reasons, the Court should grant the petition, vacate the decision below, and remand the case for further consideration in light of *Cleveland* v. *Policy Management Systems Corp.*

Respectfully submitted,

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